

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

*Oreg. Affidavit
The mailing*

77-1487

To be argued by
SHIRA A. SCHEINDLIN

United States Court of Appeals FOR THE SECOND CIRCUIT

Docket No. 77-1487

UNITED STATES OF AMERICA,

Appellee,

—against—

JOSE NUNEZ,

Appellant,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE

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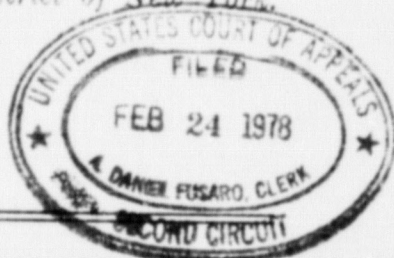


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UNITED STATES OF AMERICA,

—against—

JOSE NUNEZ,

Appellee,

Appellant.

BRIEF FOR THE APPELLEE

Preliminary Statement

Appellant Jose Nunez appeals from an order of the United States District Court for the Eastern District of New York (Pratt, J.), entered on November 18, 1977, denying his motion, pursuant to Rule 35, Federal Rules of Criminal Procedure, for the correction of sentence imposed in accordance with 18 U.S.C. § 3651. The sentence, which the Court refused to modify, consists of a three-year prison term, six months to be served in a jail-type institution and the balance of the prison term suspended, to be followed by a four-year period of probation.

Defendant raises only one issue on this appeal: whether the sentence imposed by the district court is illegal since the period of probation exceeds the length of the suspended portion of the prison term.

Statement of Facts

On February 17, 1977, Jose Nunez was convicted, after a jury trial, of possession of counterfeit notes with intent to defraud (19 U.S.C. § 472). In his appeal from that conviction, in addition to seeking a reversal of the jury verdict, the defendant sought to challenge the legality of his sentence.* This Court affirmed the defendant's conviction but directed that it could not consider the merits of defendant's claim regarding his sentence until the defendant had first raised the issue in the district court.

Thereafter, on October 14, 1977, the defendant filed a motion pursuant to Rule 35, seeking a correction of his sentence on the ground that the four-year period of probation was improper and illegal since it exceeded the suspended portion of the prison term. Nunez based this claim on his interpretation of the second paragraph of Title 18, U.S.C. § 3651, which authorizes what has come to be known as the "split sentence."**

* Defendant's conviction was affirmed on June 23, 1977.

** The split sentence provision of 18 U.S.C. § 3651 provides as follows:

Upon entering a judgment of conviction of any offense not punishable by death or life imprisonment, if the maximum punishment provided for such offense is more than six months, any court having jurisdiction to try offenses against the United States, when satisfied that the ends of justice and the best interest of the public as well as the defendant will be served thereby, may impose a sentence in excess of six months and provide that the defendant be confined in a jail-type institution or a treatment institution for a period not exceeding six months and that the execution of the remainder of the sentence be suspended *and the defendant placed on probation for such period* and upon such terms and conditions as the court deems best [emphasis added].

Nunez argued, as he does here, that the language of this paragraph is ambiguous in that the phrase "for such period" (referring to the period of probation) could be read, on the one hand, to refer back to the preceding phrase "remainder of the sentence" (referring to the suspended portion of the prison term), or, on the other hand, it might be qualified by the subsequent phrase "as the court deems best". If the former interpretation is correct, then the sentence imposed by the court is illegal in that the period of probation exceeds the suspended portion of the jail term.

In arguing that the probationary period he received was not statutorily authorized, Nunez relied on the legislative history of 18 U.S.C. § 3651 and on the "doctrine of lenity" applicable to statutory interpretation.

In a memorandum opinion filed on November 18, 1977,* the district court rejected Nunez's claim, finding the language of the section to be clear and unambiguous. The court further observed (App. B, p. 2): "Clearly, Congress intended in § 3651 that if a court imposes probation, its length, as well as its terms and conditions (up to a maximum of five years), lie within the sentencing court's discretion". Nunez is now appealing that decision.

* A copy of the Memorandum and Order of the district court appears as "B" to defendant's Appendix.

ARGUMENT

Appellant was properly sentenced under Title 18, United States Code, Section 3651.

Section 3651 of Title 18, United States Code, sets forth the statutory authority which governs the power of a district court to place a defendant on probation. The first paragraph of Section 3651 provides that upon entry of a judgment of conviction a court "may suspend the imposition or execution of sentence and place the defendant on probation *for such period and upon such terms and conditions* as the court deems best" [emphasis added]. There is no ambiguity here. A court is thus empowered, in its discretion, to suspend the execution or imposition of sentence. If it chooses this course, the court is required to set a definite period of probation. The terms and conditions of that probation are left to the court's discretion, except as limited by the fifth paragraph of Section 3651, which provides that the period of probation and any extension thereof shall not exceed five years.

The second paragraph of Section 3651 authorizes the "split sentence". Under this section a court may impose a sentence of which no more than six months may be served in confinement, suspend the remainder of the sentence, and set a term of probation "for such period and upon such terms and conditions as the court deems best." Appellant's argument that the term "for such period" might refer back to the preceding phrase "remainder of the sentence" affronts the clear language of Section 3651, and virtually ignores the first paragraph of that statute.

It is a settled principle of statutory construction that "[w]hen the same word or phrase is used in the same section of an act more than once, and the meaning is clear as used in one place, it will be construed to have

the same meaning in the next place." *Meyer v. United States*, 175 F.2d 45, 47 (2d Cir. 1949). Here it must be noted that the term "for such period" in the first paragraph has no specific antecedent; hence, it is absolutely clear that the length of the probationary term authorized by the first paragraph is solely within the discretion of the court, except as circumscribed by the five-year limitation set forth in paragraph five. Given the clear meaning of the term "for such period" in the first paragraph, there is no reason evident on the face of the statute why that same term should not have the same meaning in the second paragraph of the statute, especially since the term appears within identical passages ("probation for such period and upon such terms and conditions as the court deems best") in both paragraphs.

Moreover, the phrase "such terms and conditions" in the first and second paragraphs has no specific antecedents. It is therefore obvious that the terms "for such period" and "upon such terms and conditions" in the second paragraph (as in the first) are employed as parallel parts of the same phrase. There is no reason to bifurcate these parallel terms so that the former relates back while the latter stands independently. Just as two provisions in the same statute cannot be read inconsistently, surely, one half of a parallel phrase should not be given a different syntactical construction than the other half.

We therefore submit that the challenged statute is unambiguous and that the intent of Congress is clear on its face. It is apparent that the sole limitation placed upon the length of the probationary term is found in the fifth paragraph of the statute. The phrase "for such period" in the second paragraph indicates, when read together with the fifth paragraph, that up to a limit of five years, the court has unfettered discretion in fixing

the length of the probationary term.* Indeed, appellant's argument militates against the statute's clear purpose, namely, to provide the sentencing judge with broad discretion.** Based upon a plain reading of an unambiguous statute, appellant's argument must fail.

Appellant further contends that the language of the statute is so ambiguous that the correct interpretation cannot be gleaned from the face of the statute but rather must be sought in its legislative history. Appellant cites the legislative history of the second paragraph of section 3651 in support of his contention that the period of probation may not exceed the length of the suspended portion of a sentence. We submit that since the statute is clear and unambiguous, resort to legislative history is unjustified. *Holtzman v. Schlesinger*, 484 F.2d 1307, 1314, (2d Cir. 1973) *cert. denied*, 416 U.S. 936 (1974). Moreover, a reading of the legislative material cited by the appellant indicates that it does not support his position.

Prior to the 1958 amendment to section 3651 (which added the second paragraph), a court had no means of sentencing a defendant under a single-count conviction to both a period of imprisonment and a period of probation; at that time such a dual sentence could only be imposed where there was a multi-count conviction. The 1958 amendment gave courts the power to sentence a defendant

* It has been consistently held that the period of probation may exceed the maximum period of imprisonment to which a defendant might have been sentenced. See, e.g., *Driver v. United States*, 232 F.2d 418, 421-422 (4th Cir. 1956); *Mitchem v. United States*, 193 F.2d 55, 57 (5th Cir. 1951).

** Should appellant's restrictive reading of the statute be adopted, it would presumably encourage district courts to impose longer suspended sentences in order to maintain the same probationary periods imposed prior to the adoption of the restrictive reading.

on a one-count conviction to a term of imprisonment, of which a maximum period of six months could be served, to be followed by a required and definite period of probation. This combination became known as the "split sentence." See, *United States v. Sanjurjo*, 481 F.2d 638 (2d Cir. 1973); *United States v. Wertheimer*, 434 F.2d 1004, 1006 (2d Cir. 1970). The legislative history cited by appellant reveals little more than a concern by Congress over the inability of courts to sentence defendants to both a term of imprisonment and a term of probation on a single-count conviction. We submit that a reading of the legislative history does not support appellant's contention here.

Furthermore, appellant's reliance on *United States v. Teresi*, 484 F.2d 894 (7th Cir. 1973), is misplaced. In *Teresi* the court found that a sentence of three years' imprisonment with six months to be served, the remainder to be suspended, and two and one-half years' probation was not void. The finding that this particular sentence was acceptable does not imply that the *Teresi* court would have found a longer period of probation to be unacceptable. Thus, *Teresi* does not support the proposition that the period of probation must be limited to the suspended portion of the sentence. Other courts have not found § 3651 to be limited in this manner. See, e.g., *Fagan v. United States*, 545 F.2d 1005, 1006 (5th Cir. 1977), in which the defendant was sentenced to eighteen months' imprisonment, served three months, and subsequently remained on probation for five years pursuant to the split sentence provision of 18 U.S.C. § 3651. The Government, of course, does not argue that a court is *required* to impose probation for a period in excess of the suspended portion of the sentence, but that it *may* do so in its discretion.

Appellant's argument that the sentence imposed here is, in reality, two sentences and not one is totally without merit. Probation is a component of any sentence and is

not an additional punishment unrelated to other forms of punishment. As appellant himself notes, (Br. 6) the purpose of 18 U.S.C. § 3651 is to allow two forms of punishment on a single count conviction. Finally, since there is no logical or internal ambiguity as to the language of this statute, the doctrine of lenity raised by appellant is totally inapplicable.*

CONCLUSION

For all the above-stated reasons, we submit that appellant's sentence was proper under 18 U.S.C. § 3651 and should be upheld.

Respectfully submitted,

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* We also suggest that the rationale for the doctrine of lenity would seem to be stronger when the question is a statute's area of proscription rather than its punishment, for the most basic requirement of a criminal statute is that it give fair warning of what behavior is prohibited. See *United States v. Bass*, 404 U.S. 336, 347-348 (1971); *United States v. Universal C.I.T. Credit Corp.*, 344 U.S. 218, 221-222 (1952).

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AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK } ss

Dolores Byrd being duly sworn,

deposes and says that he is employed in the office of the United States Attorney for the Eastern District of New York.

That on the 22nd day of February 19 78 he served a copy of the within
Brief for the Appellee

by placing the same in a properly postpaid franked envelope addressed to:
Steven Barrett, Legal Aid Society

509 U.S. Courthouse
Foley Square, New York, N.Y. 10007

and deponent further says that he sealed the said envelope and placed the same in the mail chute
drop for mailing in the United States Court House, ^{225 Cadman Plaza East} ~~Eastern District of New York~~, Borough of Brooklyn, County
of Kings, City of New York.

Dolores In Byrd

Sworn to before me this

22nd day of February 19 78

Barbara Allen

BARBARA A. ALLEN
Notary Public, State of New York
No. 24-4846824
Qualified in Kings County
Commission Expires March 30, 1979

